WINSTON S. MCCLINTOCK
v.
VETERANS ADMINISTRATION

Docket No.
AT315H09046

OPINION AND ORDER

Appellant was appointed to the position of Dental Laboratory Technician at the Veterans Administration Outpatient Clinic, Riviera Beach, Florida, on September 10, 1979, and was terminated effective May 7, 1980, during his probationary period, for post-appointment reasons. In his appeal to the Board's Atlanta Field Office, appellant, who designated the union local as his representative, disputed the merits of the discharge and alleged that the termination was based on marital status discrimination.

In support of his allegation, appellant stated that he was terminated because he, a single person, was dating a single co-worker who became pregnant while they were dating. He alleged that his supervisors knew of his co-worker's pregnancy, gave her a "hard time" about maternity leave, and, thereafter, dismissed him.

In response to appellant's allegations, the agency asserted that appellant's dismissal was based solely on his lack of dependability in accounting for and securing gold, as well as his unwillingness to properly and accurately document gold ledger records.

After a hearing at which the appellant appeared *pro se*, the presiding official concluded that the appellant failed to establish a prima facie case of marital status discrimination, and dismissed the appeal as not being within the Board's appellate jurisdiction.

In his petition for review, appellant contends that he should be provided another hearing because he did not receive sufficient notice to allow him to obtain legal representation for the hearing. The record, however, clearly shows that appellant and his designated representative, the union local, received adequate notice of the hearing. But even if adequate notice was not received, we would not find error since appellant had the opportunity to designate an attorney as his representative from the day he filed his appeal, but failed to do so; and because there is no indication in the record that he ever requested the presiding official to postpone the hearing to provide him time to engage an attorney.

We have also reviewed appellant's other contentions and find that they do not establish the existence of new and material evidence which was unavailable when the record closed or that the presiding official made an erroneous interpretation of law or regulation as required by 5 C.F.R. 1201.115.

Accordingly, his petition for review is DENIED. Nevertheless, our review of the initial decision reveals an important question concerning the quantum of proof necessary to establish a prima facie case of discrimination based on marital status. The initial decision is thus RE-OPENED on the Board's own motion pursuant to 5 C.F.R. 1201.117.

The presiding official held that although marital status discrimination was not prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, the similarity between the types of discrimination prohibited by that title and marital status discrimination was sufficient to make it logical to apply the analytical approach developed in Title VII cases to issues of marital status discrimination. The presiding official also held, however, that "the quantum of proof necessary to establish a prima facie case of marital status discrimination was greater than that required to establish a prima facie case of discrimination under Title VII." Initial Decision at 5. We agree that the analytical approach in Title VII cases is applicable to marital status discrimination claims, but we do not agree that a greater quantum is necessary to prove a prima facie case of marital status discrimination. In our opinion, an employee alleging marital status discrimination has the same burden in proving a prima facie case as an employee alleging discrimination prohibited by Title VII.

But in this case, appellant did not introduce any evidence establishing a prima facie case of marital status discrimination. For example, there is no evidence in the record that he was treated differently than similarly situated married employees. *See McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Moreover, even if we were to find that the appellant established a prima facie case of marital discrimination, it is clear from the record that the agency rebutted appellant's case by articulating a legitimate, nondiscriminatory reason for the termination. *McDonnell Douglas v. Green, supra; Board of Trustees v. Sweeney*, 439 U.S. 24 (1978). As the presiding official stated, the agency asserted "that appellant's dismissal was based solely on his alleged lack of dependability in accounting for and securing gold, as well as his alleged unwillingness to document properly and accurately gold ledger records." Initial Decision at 6. Inasmuch as the record reveals that appellant was responsible for handling gold as a dental technician and properly accounting for it but failed to do so, there was a legitimate basis for the termination.

Under *McDonnell Douglas, supra*, and *Sweeney, supra*, the burden thus shifted to appellant to establish pretext when the agency articulated a legitimate, nondiscriminatory reason for his termination. But appellant pointed to no evidence which would support a finding of pretext. Appellant alleged that the agency gave a pregnant co-worker, his girl friend, a "hard time" while the agency did not treat other pregnant workers who were married in such a manner. Thus, he contended that this treatment supports his allegation of agency animosity toward single people. The presiding official, however, found that appellant's co-worker

was not treated differently than other pregnant workers, except for one such worker who was ill with terminal cancer. Initial Decision at 7, n. 6. The presiding official also found that the passage of time from when the agency was informed of the pregnancy until the removal, five months later, tended to dispel the notion that the agency discriminated against appellant because of his marital status, as did the fact that his co-worker was not dismissed. Initial Decision at 6. Therefore, we find that appellant has not presented sufficient evidence to establish that the reason for his termination was his marital status rather than the nondiscriminatory reasons given by the agency.

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b). Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

WASHINGTON, D.C., *June 1, 1981*